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In the
Supreme Court of the United States
October Term, 2004

S. D. WARREN COMPANY,
Petitioner,
v.
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation files the accompanying brief in support of this Court's consideration of the first question presented by Petitioner S. D. Warren Company ("Warren"):

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters concerning the need for this Court to clarify the correct test to be used to determine whether a discharge has occurred within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a). The need for such clarification is urgent because of the Supreme Judicial Court of Maine's manifestly erroneous use of a purported change in the legal status of the water as the determinative factor rather than whether an actual addition has been made to the body of water at issue, which this Court indicated should be the test in *South Florida Management District v. Miccosukee Tribe*, 541 U.S. 95

(2004).[1]

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon an application of the federal laws enacted to protect the environment, such as the Clean Water Act ("CWA"), 33 U.S.C. §§1251, *et seq.*, in a way that fairly reflects Congress's intentions as embodied in such statutes. Especially in a time of diminishing oil and gas reserves, it is important that costly regulatory requirements be imposed on renewable sources of energy, such as hydroelectric dams, only if they are well grounded in the provisions of the CWA. NELF's members and supporters believe that a balanced and reasonable approach to regulation, which respects the economic efficiencies of free market forces, is essential for the maintenance of a robust business climate, which in turn is essential to the long-term success of the region's businesses.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] *Amicus* believes that serious negative consequences for all businesses and other activities that involve use of the national waterways may well result from the Maine Supreme Judicial Court's novel and manifestly erroneous expansion of the meaning of "discharge" as used in Section 401(a) of the CWA. *Amicus* believes that this brief provides an additional perspective which may aid the Court in determining whether to grant this petition for a writ of *certiorari*. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amicus has submitted consents by all parties to the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioner S.D. Warren Company ("Warren").

SUMMARY OF ARGUMENT

This petition for *certiorari* to the United States Supreme Court seeks review of the Supreme Judicial Court ("SJC") of Maine's determination that a discharge occurs within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a) from the operation of Warren's dam projects on the Presumpscot River in Maine. In reaching this conclusion, the SJC engaged in a startling departure from prior federal jurisprudence under the CWA, including the recent decision by this Court in *South Florida Water Management District v.*

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2 *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Miccosukee Tribe, 541 U.S. 95 (2004) ("*Miccosukee*"). Eschewing these precedents, the Maine court applied a novel test to determine the existence of a discharge, holding that a purported change in the river water's legal status as it passes through Warren's dams, *i.e.*, its alleged transformation back into waters of the United States as it emerges after a brief passage through the "private control" of the dams, constitutes an "addition" sufficient for a finding that a discharge occurs under Section 401(a). The Maine Court's new test is manifestly erroneous because it is based on no tangible change in the water of the river, bears no logical connection to the purposes served by the CWA, and leads to irrational results. Moreover, the SJC's test directly contradicts this Court's decision in *Miccosukee*, which confirms that where, as in this case, water is merely transferred from one portion of a body of water to another portion of the same body of water, no addition—and, therefore, no discharge—can occur within the meaning of Section 401(a). This Court should grant Warren's petition in order to address the conflict with *Miccosukee* that the SJC has now created.

ARGUMENT

I. The legal status test applied by the SJC to determine whether the flow of water through Warren's Dams results in an "addition," and thereby a "discharge," under Section 401(a) of the Clean Water Act is erroneous under the CWA and, if followed, would lead to absurd results.

The primary issue before the SJC in this case was whether the operation of Warren's five hydroelectric dam projects on the Presumpscot River in Maine result in a "discharge" to the waters of the river within the meaning of Section 401(a) of the

CWA . To answer that question, the SJC had to decide whether Warren's dam projects cause an "addition" to the river's waters, since, as explained below, an "addition" is required for there to be a "discharge." Faced with a situation in which, on the undisputed facts, no actual addition to the waters of the Presumpscot River results from the operation of Warren's dams, the SJC, in a breathtaking departure from federal decisions in this area, focused on a purported and wholly intangible change in the water's status while it passes through Warren's dams. The SJC asserted that for a few moments the water is no longer water of the United States because it is under private control and that an "addition" occurs when the water regains national status upon leaving the dams. Whatever the merit of the SJC's assertions regarding the water's change in legal status, its focus on a wholly intangible change to the river's water as the basis for its conclusion that Section 401(a) applies is incompatible with the purpose of the CWA, which was intended to deal with the tangible issue of water quality in this country.

The Federal Power Act ("FPA"), 16 U.S.C. §§ 791a, *et seq.*, vests in the Federal Energy Regulatory Commission ("FERC") the responsibility for licensing the construction, operation and maintenance of hydroelectric dams, such as the dams owned and operated by Warren that are at issue in this case. 16 U.S.C. § 797(e). Section 401(a) of the CWA, 33 U.S.C. § 1341(a), provides that, where an applicant is seeking a federal license for any activity that "may result in any *discharge* into the navigable waters" (emphasis added) the applicant must provide the licensing agency with a certification from the state in which that discharge may occur that the discharge will be in compliance with the water quality standards of both the CWA

and the affected state. 33 U.S.C. § 1341(a). Accordingly, where, the owner and operator of a hydroelectric dam applies to FERC for a renewal of its federal license pursuant to the FPA, it must obtain state water quality certification *if* the operation of its dam results in a "discharge" within the meaning of Section 401(a) of the CWA.

In this case, Warren applied to FERC for the re-licensing of the five hydroelectric dam projects that it owns and operates on the Presumpscot River in Maine. Because of the interplay of the FPA and Section 401(a) of the CWA, Warren was required to apply for water quality certification from the Maine Department of Environmental Protection ("DEP"). This Warren did under protest. Warren's position was, and remains, that the operation of its dams does not result in a discharge into the waters of the Presumpscot River. Therefore it asserts that no DEP certification is required under Section 401(a).

Warren's argument that the activities of its dams do not cause a discharge under Section 401(a) is based on the legal requirements of the CWA and the undisputed facts surrounding the dams' operations. Under the CWA, for there to be a discharge within the meaning of Section 401(a) there must be an "addition" of something to the water body at issue. *See* Section 502(12) of the CWA, 33 U.S.C. §1362(12);[3] *North*

3 33 U.S.C. § 1362(12) states: "The term 'discharge of any pollutant' and the term 'discharge of pollutants' each mean (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (Emphasis added.)

Carolina v. FERC, 112 F. 3d 1175, 1188 (D.C. Cir. 1997) (because the volume of water passing through the dam's turbines decreased, there was no addition and, therefore, no discharge). It is undisputed that Warren's hydroelectric dam projects are operated in "run-of-river" mode, *i.e.*, outflow from each dam is approximately equal to inflow on an instantaneous basis during normal operating conditions, App. At A-120, and the operation of the dams neither removes nor adds any substance, not even water from or to the river's waters, App. At A-87 to A-88, A-106 to A-110, A-120 to A-121.

Even as it agreed with the premises of Warren's argument, the SJC denied Warren's appeal. The SJC acknowledged that the operation of Warren's dams neither subtracts from nor adds to the total amount of water in the river. *S.D. Warren Co. v. Board of Environmental Protection*, 868 A. 2d 210, 216 (2005) (*"Warren"*). Likewise, it recognized that "[a]n 'addition' is the fundamental characteristic of any discharge." *Id.*, 868 A. 2d at 215 (citing *North Carolina v. FERC*, 112 F. 3d 1175, 1187 (D.C. Dir. 1997). Nonetheless, the SJC, by improperly altering the test to be applied, concluded that the operation of the dams results in a discharge under Section 401(a) of the CWA.

Simply put, because the court below could not find an actual "discharge" resulting from the operation of the dams, it invented a new "control" test for determining the existence of a discharge based on a dubious legal distinction. In a truly novel chain of reasoning, the Maine SJC determined that when the river's waters pass through Warren's dams, those waters are no longer waters of the United States because for a few moments they are under private control. The Court then concluded "[b]ecause these waters have lost their status as *waters of the*

United States, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*." *Warren*, 868 A. 2d at 216 (emphasis in the original).

In reaching this conclusion, the SJC completely disconnected the determination of whether there is a discharge under the CWA from the question of whether an addition to the waters at issue has actually occurred. Even assuming, *arguendo*, that the SJC was right when it reasoned that, while passing through Warren's dams, the waters of the Presumpscot River cease to be waters of the United States, the SJC was manifestly wrong in using this putative change in the waters' status as a test for whether or not an "addition," and thereby a discharge, occurs within the meaning of Section 401(a).

Unlike the SJC, other courts called upon to construe the meaning of an "addition" under the CWA have applied a common sense normal English language meaning to that term. They have interpreted it as referring to a physical, chemical, biological, or other substantive alteration in the water body at issue, not merely a momentary change in the water's legal status. The word "addition" is commonly defined to mean "something added." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) at 20. In the context of the CWA, the purpose of which is to preserve the "chemical, physical and biological integrity of the nation's water supply," 33 U.S.C. § 1251(a); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948-949 (7th Cir. 2004), to add "something" has been found consistently to mean an actual alteration in one or all of these three dimensions—chemical, physical or biological, *see, e.g.*,*id.*, 361 F.3d at 949 (addition consists of "discharge of dredged material, such as that

removed from the supply pond, into a contiguous body of water or wetland"), and not to a mere change in name, title or control. Indeed, without more, these latter changes—such as the change that the SJC purported to identify in this case, *i.e.*, the river water's purported temporary loss of status as United States waters—can have no impact on the very aspects of the nation's water supply with which the CWA is concerned. Logically, therefore, the test for an "addition" under the CWA cannot hinge on such factors.[4]

The inherent weakness of the SJC's approach, and its lack of grounding in the CWA, is demonstrated by the fact that it proves too much and, if followed, would lead to absurd results. Thus, under the SJC's test all non-federally operated dam projects, without exception, would result in a discharge within the meaning of Section 401(a), because all such projects would inevitably result in a redeposit into the waters of the United

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4 Significantly, the case cited by the SJC in support of its new test for an "addition" does not support it. Specifically, *Dubois v. U.S. Dept Agriculture*, 102 F.3d 1273 (1st Cir. 1996), is distinguishable from this case because it involved the transfer of water, through snowmaking pipes, from a river to a pond, which the Court of Appeals for the First Circuit found were two distinct water bodies. In this case, only one water body, the Presumpscot River, is involved. In the course of its discussion of the applicability of the CWA to the facts before it, the Court of Appeals in *Dubois* stated that the status of the water in that case was private as part of its criticism of the district court for not considering that pristine waters of Loon Pond were removed and mixed with more polluted waters prior to discharge back into Loon Pond. *Dubois*, 102 F.3d at 1297. The Court of Appeals at no time indicated that a change in the status of control of a water source alone could be an "addition." *See Dubois*, 102 F.3d 1273. Therefore, under *Dubois*, even if it is accepted, *arguendo*, that the water's status while in the dam does change, that change in status is insufficient to create an "addition."

States, whether or not an actual addition to the water has occurred. As the SJC itself recognized, even as it found that an "addition" has occurred, "Warren is not adding more water to the river." *Warren*, 868 A.2d at 216. In this way, the SJC's test makes meaningless the requirements of Section 401(a).

Further, the SJC's test arguably would require a finding that an "addition" has occurred even where a dam's operation actually reduces the volume of water in a river, because even a smaller volume of water reentering the river after passing through the dam would still be "an addition *to the waters of the United States*." *Warren*, 868 A.2d at 216 (emphasis in the original). Such a result would contradict the holding in *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997), which the SJC in another connection cites with favor (868 A.2d at 215), that there cannot be an addition or a discharge under the CWA where there is a decrease in the volume of water passing through a dam's turbines.

But the chief defect of the SJC's novel test is that it has unmoored the determination of whether there is a discharge, which is required to decide whether Section 401(a) of the CWA applies, from what is actually occurring physically, chemically, and biologically in the water body at issue. Given that the CWA is concerned with these parameters, any test that ignores them cannot serve the purposes of that statute. Accordingly, the SJC's novel test in this case is without basis in the CWA and should be rejected by this Court.

II. The SJC's Test Flatly Contradicts this Court's Teaching in *Miccosukee*

The change in legal control test employed by the SJC rests on the Maine court's view that when water is removed from a body of water, the simple redeposit of that same water back into the water body from which it came can qualify as an "addition" and, therefore, a discharge under the CWA. *Warren*, 868 A. 2d at 215. That the SJC is mistaken in this regard was made clear by this Court in *Miccosukee*.

Quoting with approval the Second Circuit's observation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001,) that, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot," 273 F. 3d at 492, this Court in *Miccosukee* affirmed that where, as here, water is simply being moved from one part of a water body to another part of the same water body (in this case, the Presumpscot River), there cannot be an "addition" under the CWA. 541 U.S. at 109. Plainly, under *Miccosukee*, the fact that, arguably, the river's water might briefly come under private control (in this case as it passes through Warren's dams) while it flows from one part of the river to another is irrelevant under the CWA, since no addition can have occurred.[5]

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5 *Miccosukee* also makes it clear that, to the extent that the Presumpscot River's waters arguably are diverted from their natural path as they pass through Warren's dam projects, no addition under the CWA has occurred. As the Court observed, "[t]he [respondent] does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of any pollutants." 541 U.S. at 108. Likewise, a diversion of the Presumpscot River's waters

In short, this Court has made it clear in *Miccosukee* that the physical removal from and the replacement of the same water into the same body of water cannot quality as an "addition" under the CWA. From this the conclusion is inescapable that a theoretical "removal" based purely on a questionable, brief change in legal status is likewise incapable of meeting that requirement. This court should therefore grant the *certiorari* petition to address the conflict with its teaching in *Miccosukee* that has now been created by the Maine court's use of an erroneous test to determine whether an "addition," and, thereby, a "discharge," has occurred within the meaning of the CWA.

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through Warren's dams cannot constitute an addition under *Miccosukee*'s teaching.

CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner S.D. Warren Company for a writ of *certiorari*.

Respectfully submitted,

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